

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	No. 55777-7-I
)	
Respondent,)	
)	
v.)	
)	
GWYNDA ANN ANDERSON,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: August 7, 2006
)	

PER CURIAM. Under CrR 8.3(b), a court may dismiss a prosecution for governmental misconduct if the defendant demonstrates misconduct and prejudice to his or her right to a fair trial. Because Gwynda Anderson failed to establish either presumptive or actual prejudice from the alleged misconduct in this case, we conclude the trial court did not abuse its discretion in denying her motion to dismiss under CrR 8.3(b). Accordingly, we affirm her convictions for theft, possession of stolen property, and forgery.

FACTS

Gwynda Anderson was a receptionist and bookkeeper for Rockworks and McAllister Rockeries from 2001 to 2003. Based on evidence that she used a company credit card and other instruments to steal over \$50,000, Rockworks filed a civil action

against her and the State commenced a criminal investigation.

Anderson retained attorney David Smith to represent her in both the civil and criminal matters. Smith notified Detective Haley of the Snohomish County sheriff's office that he represented Anderson in both matters.

In December 2003, Detective Haley obtained and executed a search warrant for Anderson's home. The detective and sheriff's deputies seized numerous items, including Anderson's computer and some letters. They subsequently arrested Anderson and charged her with first degree theft, second degree possession of stolen property, and forgery.

Anderson filed a motion for return of property seeking, among other things, the return of privileged communications with her counsel. The State returned Anderson's computer and some letters from her attorney. Anderson then filed a motion to dismiss the charges, arguing that the police had seized attorney-client communications discussing trial strategy and that such conduct amounted to governmental misconduct warranting dismissal.

Following a hearing at which Anderson, attorney Smith, Detective Haley, and the charging prosecutor testified, the court denied Anderson's motion. The court found there had been no governmental misconduct and no prejudice to Anderson's case. The court specifically found Detective Haley's testimony, including his claim that he never read or used any privileged information, was credible. It also found that the seizure of attorney-client communications was inadvertent and pursuant to a legal warrant, there was no evidence the prosecutor received any confidential information, and the seizure of attorney-client communications did not destroy Anderson's confidence in her counsel.

Anderson proceeded to trial on stipulated facts. The court found her guilty on all three counts and sentenced her to nine months of confinement.

DECISION

The sole issue on appeal is whether the trial court abused its discretion in denying Anderson's motion to dismiss under CrR 8.3(b). That rule provides in pertinent part:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect[s] the accused's right to a fair trial.

A defendant seeking dismissal must show arbitrary action or governmental misconduct prejudicing his or her right to a fair trial.¹ The arbitrary action or mismanagement need not be evil or dishonest; simple mismanagement is enough.² In cases involving governmental intrusion into the attorney-client relationship, prejudice will be presumed if the intrusion was purposeful and unjustified.³ Dismissal is an extraordinary remedy and is available only in "truly egregious cases of mismanagement or misconduct."⁴ A decision denying dismissal under CrR 8.3 is reviewed for abuse of discretion.⁵

We need not decide whether governmental misconduct occurred in this case

¹ State v. Garza, 99 Wn. App. 291, 295, 994 P.2d 868 (2000). The prejudice must be actual, not speculative. State v. McConville, 122 Wn. App. 640, 647, 94 P.3d 401 (2004), review denied, 153 Wn.2d 1025 (2005).

² Garza, 99 Wn. App. at 295.

³ Id. at 299–301.

⁴ State v. Duggins, 68 Wn. App. 396, 401, 844 P.2d 441, aff'd, 121 Wn.2d 524, 852 P.2d 294 (1993); Garza, 99 Wn. App. at 295.

⁵ Id.

because even assuming it did, there is no showing of either presumptive or actual prejudice. As noted above, prejudice is presumed only if there was an intrusion into the attorney-client relationship, and the intrusion was both purposeful and unjustified. Anderson contends the police purposefully intruded into her attorney-client relationship when they “seized, examined, and perhaps read the private attorney-client communications.”⁶ This contention fails for several reasons.

First, the trial court found that the seizure of any attorney-client communications was inadvertent and due to carelessness. Substantial evidence supports that finding. The warrant did not target such communications, and there is no evidence that Detective Haley or other officers participating in the search knowingly seized them. None of the officers knew what was in Anderson’s computer when they seized it. And while Detective Haley conceded that another detective had seized some documents, placed them in an envelope, and labeled the envelope “legal papers,” there was no evidence as to what type of legal papers were in the envelope. As the trial court noted, the words “legal papers” could have referred to all kinds of documents unrelated to attorney-client communications. Thus, there simply is no evidence in the record that Haley or the other officers purposely seized attorney-client communications.

Second, given the court’s credibility determination, there was no evidence of a purposeful intrusion into any confidences contained in the seized documents. The court expressly found Detective Haley’s testimony credible, including his testimony that he did not read or use any privileged information. Detective Haley testified that he only saw

⁶ App. Br. at 14.

one piece of legal correspondence during the search. He did not read that document and left it at Anderson's home. Haley later discovered other attorney-client communications in the seized evidence, but testified that he did not examine or read them and set them aside as soon as it became apparent that the correspondence was from a lawyer. Haley further testified that he did not recall seeing any confidential e-mails and that the police did not seize any hard copies of attorney-client e-mails that Anderson testified were missing after the search. In short, the court's determination that Haley was credible⁷ defeats Anderson's claims of purposeful intrusion and presumed prejudice.⁸

In the absence of presumed prejudice, Anderson could obtain dismissal under CrR 8.3 only if she established actual prejudice. In this context, actual prejudice can be established

by demonstrating (1) that evidence gained through the intrusion will be used against them at trial; (2) that the prosecution is using confidential information pertaining to defense strategies; (3) that the intrusions have destroyed their confidence in their attorneys; or (4) that the intrusions will otherwise give the State an unfair advantage at trial.⁹

Anderson failed to establish any of these forms of prejudice, and the trial court's

⁷ Credibility determinations are not reviewable on appeal. In re Pers. Restraint of Davis, 152 Wn.2d 647, 680, 101 P.3d 1 (2004).

⁸ The cases cited by Anderson all involved clearly purposeful intrusions into the defendant's attorney-client relations. State v. Garza, 99 Wn. App. 291, 994 P.2d 868 (2000) (corrections officers seized and examined inmates' legal materials after discovering an attempted escape); State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963) (police eavesdropped on a conversation between a defendant and his attorney); State v. Granacki, 90 Wn. App. 598, 959 P.2d 667 (1998) (bailiff saw detective looking at defense counsel's notes during a recess in trial proceedings).

⁹ Garza, 99 Wn. App. at 301.

findings to that effect are supported by substantial evidence.

Although attorney Smith testified below that there were more than a dozen letters or e-mails to Anderson in which he mentioned strategies and tactics applicable to both the civil and criminal actions, there was no evidence establishing the specific content of any of those communications.¹⁰ Furthermore, Detective Haley testified that he did not examine any confidential documents, did not recall seeing any confidential e-mails, and

¹⁰ As the State correctly points out, Anderson could have made a record of the contents of the communications by submitting them below for in camera review. See, e.g., Versuslaw, Inc. v. Stoel Rives, L.L.P., 127 Wn. App. 309, 331, 111 P.3d 866 (2005).

did not forward any confidential information to the prosecutor. The prosecutor corroborated the latter portion of Haley's testimony and, as previously noted, the court found Haley credible. Finally, while Anderson ultimately removed attorney Smith from the criminal case, the trial court found that occurred because Smith would be a witness in the dismissal hearing, not because Anderson had lost confidence in him. That finding is supported by Anderson's own affidavit and attorney Smith's testimony that he was still representing Anderson in the civil action.

In conclusion, for the reasons set forth above, the trial court did not abuse its discretion in denying Anderson's motion to dismiss.¹¹

Affirmed.

FOR THE COURT:

Elington, J.

Columan, J.

Ajda, J.

¹¹ We note that to the extent the court's findings state that no privileged matters were seized, they are not supported by the record. Detective Haley testified that attorney-client communications were seized and later returned to Anderson following her motion for return of documents. But it is clear that the erroneous portions of the court's findings were not material to the court's decision on the motion to dismiss. An erroneous finding of fact which does not materially affect the trial court's conclusions of law is not prejudicial. State v. Caldera, 66 Wn. App. 548, 832 P.2d 139 (1992).